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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

LARRY ANTHONY AVILA,

Defendant and Appellant.

B224340

(Los Angeles County Super. Ct.  
No. VA104553)

APPEAL from a judgment of the Superior Court of Los Angeles County, Philip H. Hickok, Judge. Affirmed as modified.

Kevin D. Sheehy, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan Sullivan Pithey and Shira B. Seigle, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Larry Anthony Avila in counts 1-4 of attempted murder (Pen. Code, §§ 664, 187),<sup>1</sup> specially finding that: (1) the offenses were committed willfully and with premeditation and deliberation (§ 664, subd. (a)); (2) the offenses were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(c)); (3) defendant personally discharged a firearm resulting in great bodily injury in three of the four attempted murder counts (§ 12022.53, subd. (d)); (4) defendant personally used and intentionally discharged a firearm (§ 12022.53, subds. (b)-(c)); and (5) defendant was armed with a .40-caliber semiautomatic handgun (§ 12022, subd. (a)(1)). Defendant was convicted in count 5 of felony evading an officer (Veh. Code, § 2800.2, subd. (a)), in count 6 of shooting at an inhabited dwelling (§ 246), and in count 7 of possession of a firearm by a felon (§ 12021, subd. (a)). The jury also found that the offenses in counts 6 and 7 were committed for the benefit of a criminal street gang. In a separate proceeding, the court found defendant served four prison terms (§ 667.5, subd. (b)), suffered two prior serious felony convictions (§ 667, subd. (a)), and two prior convictions under the three strikes law (§§ 1170.12, subds. (a)-(d), 667, subd (b)-(i)).

Defendant was sentenced to 80 years to life in state prison on count 1 and 70 years to life on counts 2-4, the latter terms to run concurrent with the sentence in count 1. Defendant was sentenced to 25 years to life on count 5, concurrent to count 1. The sentences in counts 6 and 7 were stayed pursuant to section 654. Defendant was awarded presentence custody credits of 798 days, but no presentence conduct credit.

In this timely appeal, defendant argues the section 12022.53, subdivisions (b)-(d) firearm findings are not supported by constitutionally sufficient evidence that he personally discharged a fireman. He also contends the sentence in count 5 should have been stayed under section 654. Finally, defendant argues the trial court erred by denying him presentence conduct credits.

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise indicated.

We hold there is substantial evidence defendant personally discharged a firearm within the meaning of section 12022.53, subdivisions (b)-(d), and the trial court did not err in refusing to stay the sentence in count 5 under section 654. We modify the judgment to reflect that defendant is entitled to 119 days of presentence conduct credits under section 2933.1, subdivision (c), and affirm the judgment in all other respects.

## **FACTS**

Veronica Ramirez and Denise Padilla were in a motel room in the City of Bell with Clara Street gang members Joshua Wilcox and Victor Henriquez on February 15, 2008. As they were hanging out, shots were fired into the room. Ramirez was struck by bullets in the leg and the back of her head. She spent two months in the hospital as a result of the shooting, which resulted in her having trouble moving her left arm. Padilla was struck in the ankle and spent two days in the hospital. She has a scar and the area of the wound sometimes gets hot. Henriquez was also struck in the ankle. Neither Ramirez nor Padilla saw who fired the shots.

At the time of the shooting, Officer Jason Perkins of the Maywood Police Department was at a Starbucks across the street from the motel with other officers. He heard four or five gunshots from nearby. Officer Perkins ran toward the sound of the gunshots. He saw a tall, thin male wearing dark clothing running eastbound within five seconds of hearing the gunshots. This male ignored a command to halt, entered a vehicle through the driver's door, and drove away at a high rate of speed. Officer Perkins broadcast a description over the police radio as he was running.

Officer Mark Logan of the City of Bell Police Department was also at the Starbucks and heard approximately eight gunshots. He was amazed that the shooting took place nearly right in front of them. He entered his police vehicle and drove to where he knew there was a driveway, as other officers drove in different directions.

Officer Logan saw a car with its headlights off driving toward him. He shined his spotlight on the car and tried to block its path. It came within two feet of the officer's car

but was able to maneuver around it. The vehicle was occupied by defendant as the driver, a female passenger, and Robert Garcia in the back seat. The car drove southbound on Atlantic Boulevard, with the officer, who was in uniform, following in a marked black and white patrol car displaying a City of Bell Police Department insignia with the lights and sirens on his vehicle activated.

The pursuit ended with a collision with another vehicle after a one mile chase. Officer Logan was the primary patrol car in pursuit and never lost sight of the car. The vehicle reached speeds of 60 miles per hour in 30- and 35-mile per hour speed zones. It went through three stop signs or signals. After the collision, the car spun and impacted a light pole. Defendant was still in the driver's seat. Officer Logan recovered a firearm wedged near Garcia in the back seat.

It was stipulated that defendant was 5 feet 9 inches tall at the time of arrest, weighed 170 pounds, and was 36 years old. Garcia, in the back seat, was 5 feet 7 inches, weighed 180 pounds, and was 22 years old. Gunshot residue tests were conducted on both men but not submitted for testing. No latent fingerprints were lifted from the firearm.

Deputy David Kim is assigned to the sheriff's crime lab firearms section as a forensic firearms examiner. He responded to the scene of the motel shooting. Windows were broken in the motel room, there were bullet holes in the draperies and in the walls. The firearm recovered by Officer Logan from the rear seat of the car was test fired and compared with a bullet and casings recovered from the motel. In Deputy Kim's opinion, based on a comparison of the evidence, all the casing and the bullets recovered at the motel were fired from the handgun recovered from the car driven by defendant.

Officer Angel Puente of the City of Bell Gardens Police Department testified as the prosecution gang expert. The parties stipulated that the 18th Street Gang is a criminal street gang as defined by section 186.22. Defendant bore numerous tattoos indicating his membership in the 18th Street Gang, which is a rival of the Clara Street gang. Based on a hypothetical set of facts closely tracking the evidence in this case, Officer Puente expressed the opinion the motel shooting was committed for the benefit of the 18th Street

gang by enhancing the gang's reputation for violence and instilling fear in the community.

## **DISCUSSION**

### **Sufficiency of the Evidence of Defendant as the Shooter**

Defendant argues there was constitutionally inadequate evidence to support the section 12022.53, subdivisions (b)-(d) firearm allegations in counts 1-4. Specifically, defendant argues the evidence was insufficient to establish that he personally discharged the firearm, as required by each of the applicable subdivisions of the statute. Although the record does not contain direct evidence establishing defendant as the shooter, there is substantial circumstantial evidence to support the finding, requiring us to reject defendant's contention.

“To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.’ (*People v. Kipp* (2001) 26 Cal.4th 1100, 1128.)” (*People v. Bolden* (2002) 29 Cal.4th 515, 553.) We are bound to accept the factual and credibility determinations of the trier of fact if the verdict is supported by substantial evidence. (*People v. Smith* (2005) 37 Cal.4th 733, 739; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) The standard of review is the same in cases in which the prosecution relies on circumstantial evidence. (*People v. Alexander* (2010) 49 Cal.4th 846, 917; *People v. Guerra* (2006) 37 Cal.4th 1067, 1129.)

Viewed in the light most favorable to the prosecution, the evidence establishes that defendant, as a member of the 18th Street gang, had a motive to shoot into the motel room containing the victims, two of whom were members of a rival gang. Almost immediately after the shooting, Officer Perkins saw a tall, thin male wearing dark

clothing running from the scene and entering the getaway vehicle through the driver's door. Officer Logan saw defendant in the driver's seat throughout the chase and never saw the parties in the car change positions. According to Officer Logan, defendant was wearing a dark sweatshirt. Although defendant contends there is evidence that supports the conclusion Garcia was the shooter, the jury was free to reject that contention, as it is clear that Garcia was not tall or thin and his body type was inconsistent with the person observed running by Officer Perkins.

To accept defendant's argument, we would have to reweigh the evidence in light of conflicting testimony and draw inferences contrary to the determination of the jury. This we will not do, as the jury's determination that defendant was the shooter was supported by reasonable, credible circumstantial evidence of solid value pointing to defendant as the person who shot into the motel room.

### **Application of Section 654 to Count 5 (Felony Evading)**

Defendant argues the trial court erred in refusing to impose a section 654 stay of sentence in count 5 for felony evading an officer. Defendant reasons, as he did in the trial court, that his felony evading offense was part of an indivisible transaction involving the attempted murders of the motel occupants. Defendant argues the singular objective of the felony evading was to escape the scene of the shooting and avoid capture by the police. We disagree, as there is substantial evidence that defendant harbored separate intents and objectives in the commission of the attempted murders and the evading offense.

“An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” (§ 654, subd. (a).) Under section 654, “if multiple offenses committed by a defendant were ‘incident to one objective,’ the defendant ‘may be punished for *any one of such offenses* but not for more than one.’ (*Neal v. State of California* [(1960)] 55

Cal.2d 11, 19, italics added.)” (*People v. Norrell* (1996) 13 Cal.4th 1, 6.) The determination of a defendant’s intent and objective is a factual issue for the trial court, subject to review for substantial evidence. (*People v. Akins* (1997) 56 Cal.App.4th 331, 339; *People v. Green* (1996) 50 Cal.App.4th 1076, 1085.) The California Supreme Court has “often said that the purpose of section 654 ‘is to insure that a defendant’s punishment will be commensurate with his culpability.’” (*People v. Latimer* (1993) 5 Cal.4th 1203, 1211, citing *People v. Perez* (1979) 23 Cal.3d 545, 551.)

We disagree with defendant’s argument that he had only one intent and objective, and the attempted murders and the evading offense were part of an indivisible transaction for purposes of the multiple punishment prohibition of section 654. Defendant’s intent and objective in committing counts 1-4 was to attempt to kill two Clara Street gang members and those with them in the motel room. His intent and objective in evading the pursuing officers was not to murder the occupants of the motel room—that intent had already been fulfilled. Instead, defendant had the completely separate intent and objective of escaping capture and culpability for the shootings. Multiple punishments were therefore permissible.

We are not persuaded by defendant’s attempt to blend the attempted murders and felony evading into an individual transaction. The mere fact that offenses are committed at the same time or in serial fashion does not require application of a section 654 stay. “Other cases have found separate, although sometimes simultaneous, objectives under the facts. (E.g., *People v. Coleman* (1989) 48 Cal.3d 112, 162 [assault of robbery victim had separate intent and objective than the robbery]; *People v. Nguyen* (1988) 204 Cal.App.3d 181, 189-193, 196 [harming of unresisting robbery victim a separate objective from the robbery itself]; *People v. Booth* (1988) 201 Cal.App.3d 1499, 1502 [‘dual objectives of rape and theft when entering the victims’ residences’ supported separate punishment for burglaries and rapes]; *People v. Porter* (1987) 194 Cal.App.3d 34, 37-39 [robbery and kidnapping the same victim for a later, additional, robbery had separate objectives].)” (*People v. Latimer, supra*, 5 Cal.4th at p. 1212.)

The trial court's determination not to stay count 5 under section 654 is supported by substantial evidence and is consistent with California Supreme Court authority.

### **Presentence Conduct Credits**

Defendant argues, and the Attorney General properly concedes, the trial court erred in denying defendant presentence conduct credits. Defendant was convicted of attempted murder, which is a violent felony. Under section 2933.1, subdivision (c), a defendant convicted of a violent felony is entitled to conduct credits of 15 percent of the total of presentence custody time. Here, defendant was in custody for 798 days at the time of sentencing and the parties agree he was entitled to conduct credits of 119 days.

### **DISPOSITION**

The judgment is modified to reflect that defendant is entitled to 119 days of conduct credits pursuant to Penal Code section 2933.1, subdivision (c). The trial court shall forward an amended abstract of judgment reflecting the conduct credits to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.